

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHEASTERN DIVISION

APR 28 AM 10:01  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

DONALD R. MABRY,

Plaintiff,

vs

WARDEN E. L. HARRELSON and  
THE ATTORNEY GENERAL FOR THE  
STATE OF ALABAMA

Defendants.

CIVIL ACTION NO. 95-N-1736-NE

ENTERED  
APR 28 1998

MEMORANDUM OF OPINION

Most of the § 2254 habeas claims before this court were presented in Mabry's state Rule 32 petition. According to the state court records, no appeal was taken of the denial of that petition; consequently, those claims are defaulted. It is the petitioner's contention, however, that he timely mailed a notice of appeal at the prison.

The magistrate judge held an evidentiary hearing to determine whether Mabry did or did not timely file a notice of appeal. Counsel was appointed to represent Mabry. Following the hearing, the magistrate judge entered a report and recommendation, wherein it was found that it had not been shown that Mabry mailed a notice of appeal.<sup>1</sup>

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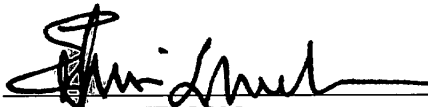
<sup>1</sup>As stated in the report and recommendation, such a finding makes moot the respondents' secondary assertion that claims which were presented in the Rule 32 appeal are pending in state court, and makes moot a discussion as to the effect of a timely mailed but undelivered notice of appeal on a default.

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The magistrate judge recommends dismissal of all of Mabry's claims as defaulted. The petitioner filed objections to the report and recommendation.

The court has considered the entire court file, as well as the current report and recommendation and the petitioner's objections to it. Also, the court has listened to the tapes of the evidentiary hearing. The court hereby adopts and accepts the findings and recommendations of the magistrate judge, including the finding that the petitioner did not establish at the evidentiary hearing that he mailed a notice of appeal of the denial of his Rule 32 petition. Thus, the pending federal claims which were raised in Mabry's Rule 32 petition, as well as the pending claims which the petitioner never presented to the state court, are all defaulted, and this petition is due to be dismissed. An appropriate order will be entered.

DONE this 26<sup>th</sup> day of April 1998.

  
EDWIN L. NELSON  
UNITED STATES DISTRICT JUDGE